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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 29/2018 concerning Abdulrahman bin Omair Rashed al Jabr al Nuaimi (Qatar)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 25 January 2018 the Working Group transmitted to the Government of Qatar a communication concerning Abdulrahman bin Omair Rashed al Jabr al Nuaimi. The Government has not replied to the communication. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Abdulrahman bin Omair Rashed al Jabr al Nuaimi is a 63-year-old Qatari national. He is a university professor of modern and contemporary history and a human rights advocate. He usually resides in Doha with his wife and seven children.

Background information

5. According to the source, in December 2013, Mr. Al Nuaimi was listed by the United States of America Department of the Treasury as a "financer and facilitator of terrorism". Subsequently, he was also listed by the Security Council's committee on sanctions against Al-Qaida, among others. The source is not aware of any evidence having been submitted by the Treasury to support those allegations. Mr. Al Nuaimi reportedly denied all charges and officially notified the United States authorities, as well as the United Nations Sanctions Committee, of his willingness to fully cooperate in order to prove his innocence. He published an official statement declaring that he was ready to stand trial for any such allegations in the United States.

6. The source indicates that, for about two years and despite the above-mentioned listings and linked allegations, the Qatari authorities did not prosecute Mr. Al Nuaimi. The source submits that this was due to the lack of material evidence against him. However, there was reportedly a marked change following the 2015 Gulf crisis, during which Bahrain, Saudi Arabia and the United Arab Emirates accused Qatar of not abiding by the Gulf Cooperation Council's principles and of supporting Islamist groups.

7. The source submits that, following the pressure that those events and certain other Gulf countries put on Qatar, in October 2015, the Qatari State Prosecutor's office opened a case against Mr. Al Nuaimi, presenting two witness testimonies. He was accused, during the period between 2010 and 2015, of having collected funds for armed groups in Egypt, Libya, Somalia, Syrian Arab Republic, Tunisia and Yemen to commit terrorist acts. It was alleged that he was providing these groups with material and financial aid and supplies, while also being aware of their aims. The source notes that the charges filed against Mr. Al Nuaimi by the Qatari Public Prosecutor reflected exactly the accusations made against him by the United States Treasury.

8. On 30 May 2016, the day of Mr. Al Nuaimi's sentencing hearing, the chief witness for the prosecution, a Qatari national security officer, reportedly withdrew his testimony in front of the Criminal Court of Doha. The second testimony made by a financial analyst did not suffice to prove beyond reasonable doubt Mr. Al Nuaimi's role as a terrorist financier. Hence, on 30 May 2016, the Court issued its judgment and declared Mr. Al Nuaimi innocent of all charges.

9. The source indicates that the Public Prosecutor did not appeal this decision. The time limit for appeal expired after 30 days, and the finding of innocence became final according to article 276 of the Criminal Procedure Code.

10. The source also indicates that, upon a request by Mr. Al Nuaimi, the Ministry of the Interior and the National Counter Terrorism Committee issued a certificate on 12 July 2016 attesting to his innocence and non-implication in any activity related to the financing of terrorism.

Arrest and detention

11. The source reports that, on 10 July 2017 at approximately 8 p.m., State Security Forces arrested Mr. Al Nuaimi while he was driving his car in the centre of Doha. They asked him to accompany them to the Public Prosecutor's office. He reportedly refused and asked them to join him in his car to avoid being publicly placed in a police car without understanding the reason for his arrest.

12. According to the source, Mr. Al Nuaimi was subsequently arrested without a warrant and without being informed verbally or otherwise of the reasons for his arrest or any charges against him. He was then brought to the headquarters of the State Security

Forces, where he was detained and told by one of the officers that the Public Prosecutor had appealed his acquittal of May 2016 and that his arrest was related to the previous charges held against him. According to the source, a senior prosecutor also visited him and said that the arrest was meant to protect him and that it was a consequence of the pressure exercised by the United States on Qatar as Mr. Al Nuaimi had repeatedly been mentioned as a financier of terrorism in the media coverage of rival Gulf States in the context of the June 2017 Gulf crisis.

13. In this respect, the source highlights that Mr. Al Nuaimi was largely portrayed by national media outlets in Bahrain, Egypt, Saudi Arabia and the United Arab Emirates as an important State official implicated in financing terrorism to destabilize the region. The source believes that these allegations illustrate that the accusations made against Mr. Al Nuaimi were politically motivated.

14. According to the source, Mr. Al Nuaimi's arrest coincided with the visit of the Qatari Foreign Minister to Washington on 27 June 2017. The source also submits that the visit of the United States Secretary of State to Doha on 11 July 2017 to sign a joint agreement aimed at combating the financing of terrorism should be noted. Qatar was reportedly the first Gulf State to sign a memorandum of understanding with the United States on combating terrorism, with the Qatari Foreign Minister claiming that this was unrelated to the pressure being applied by fellow Gulf States. The source thus submits that there is a noteworthy correlation between the pressure of the United States and neighbouring Gulf States on Qatar to clamp down on suspected terrorists and the arrest of Mr. Al Nuaimi.

15. The source reports that, a few days after his arrest, Mr. Al Nuaimi carried out a hunger strike, which lasted for about 18 days, in order to protest against the arbitrariness of his detention. He was then transferred from the headquarters of the State Security Forces to an unofficial detention facility in Doha.

16. At the time of the submission by the source, nearly four months after his initial arrest, Mr. Al Nuaimi had not been interrogated, neither in relation to the case in which he had been acquitted in May 2016, nor in relation to any new accusations against him. He had been denied access to legal representation, he did not know the reason for his detention and he had not been formally charged. He had not been afforded access to medical care despite having a heart condition. He had only been allowed visits from his sons; no other members of his family, including his wife and daughters, had been permitted to visit him.

17. The source indicates that Mr. Al Nuaimi was told by the Public Prosecutor that he could be held for at least six months before being brought before a judicial authority, in conformity with the provisions of Law No. 3/2004 on Combating Terrorism.

18. In this respect, the source refers to article 18 of Law No. 3/2004, which prescribes that the Public Prosecutor can order detention for up to 15 days for anyone suspected of having committed a terrorist crime, which can be extended for similar periods of time for up to 6 months without a court order. Mr. Al Nuaimi has been brought before the Public Prosecutor, who has prolonged his detention every 15 days in accordance with article 18.

Trial proceedings

19. According to the source, the first trial hearing took place on 23 October 2017 and was attended by Mr. Al Nuaimi's lawyer, as well as some observers and a representative of the National Human Rights Committee. However, Mr. Al Nuaimi himself was absent as the Public Prosecutor had denied him permission to travel from prison to the court. The source submits that the intended and actual effect of this was to postpone the full hearing.

20. The source indicates that the judge merely affirmed that an appeal of Mr. Al Nuaimi's acquittal by the Public Prosecutor had been officially registered by the Court of Criminal Appeal under No. 810/2017. Mr. Al Nuaimi's lawyer demanded that the judge specify whether the court would accept the request to appeal the acquittal of May 2016, which the judge could have done in the absence of Mr. Al Nuaimi. His lawyer explained that the appeal time had passed. However, the judge retreated, refused to answer the lawyer and disregarded his memorials and submissions. The Public Prosecutor requested that the

hearing be postponed and the judge immediately postponed the hearing until 27 November 2017 without addressing any of the points made by Mr. Al Nuaimi's lawyer. The hearing was subsequently postponed again until 28 January 2018.

Analysis of violations

21. In the light of the above, the source argues that Mr. Al Nuaimi's detention falls under categories I and III of the categories applicable to the consideration of cases by the Working Group, as his detention lacks any legal basis and is marked by violations of fair trial safeguards. He has not been informed of the case against him, or afforded a fair opportunity to reply or the opportunity to exercise his right to challenge the legality of his arrest before a competent authority.

Category I — absence of legal basis

22. The source submits that the arrest and detention of Mr. Al Nuaimi falls under category I as no legal basis has been officially invoked by the authorities to justify his deprivation of liberty from the time of his arrest on 10 July 2017.

23. The source notes that, if the reasoning for his detention is the Public Prosecutor's appeal against his original acquittal in May 2016, article 276 of the Criminal Procedure Code holds that the appeal period is 30 days from the date of sentencing. Article 280 of the Code further specifies that the Court will refuse any appeal if it is filed after the legally specified date. The source thus submits that, if the basis of Mr. Al Nuaimi's detention were to be for the reasons specified by the officer upon his arrest, his detention is in clear violation of national legislation.

24. The source also submits that, if the detention is made on this basis, it falls short of international standards of the force of res judicata and is subsequently void of a legal basis. In this respect, the source refers to article 38 (1) of the Statute of the International Court of Justice, which states, inter alia, that the Court, the function of which is to decide in accordance with international law such disputes as are submitted to it, should apply the general principles of law recognized by civilized nations.[1]

25. However, the source submits that the fact that Mr. Al Nuaimi has not been clearly informed of the reason for his arrest or detention is evidence enough of its arbitrariness. During his first trial hearing on 23 October 2017, the judge reportedly mentioned that his detention was related to an affair other than his previous acquittal, without stating the actual reason for his arrest. According to the source, both these facts visibly illustrate the lack of respect for due process and point to the lack of legal basis justifying Mr. Al Nuaimi's detention.

Category III — non-observance of international fair trial norms

26. The source submits that Mr. Al Nuaimi's detention is arbitrary due to the violations of fair trial rights that he has suffered from the onset of his arrest.

Arbitrary arrest

27. As stated above, Mr. Al Nuaimi was reportedly arrested by State Security Force officers who did not inform him of the reasons for his arrest, nor did they provide him with a warrant, in contravention of principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[1] The source notes that similar provisions are also found in article 14 (6) of the International Covenant on Civil and Political Rights, and article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Violations of the right of habeas corpus and of the right to be brought promptly before a judicial authority

28. According to the source, Mr. Al Nuaimi has not been brought before a judicial authority, in violation of principle 11 of the Body of Principles, which asserts that a person should not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. Mr. Al Nuaimi has thus been unable to challenge the lawfulness of his detention in violation of principle 32 of the Body of Principles, which explicitly grants him this right. The source notes that the Working Group on Arbitrary Detention has further asserted that habeas corpus is in itself a human right that can be inferred from articles 8, 9 and 10 of the Universal Declaration of Human Rights (see A/HRC/19/57, para. 59).

29. Moreover, the source submits that the provisions stipulated in article 18 of Law No. 3/2014 on Combating Terrorism contravene the right of a detainee to habeas corpus. In this respect, the source notes that the Working Group has explicitly stated that these rights also apply to terrorism suspects and has set as a principle that persons charged with terrorist acts should be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period and that the person detained on charges of terrorist activities should enjoy the effective right to habeas corpus following their detention (see A/HRC/10/21, para. 54 (e)).

30. The source also notes that the Human Rights Committee has stated that an essential safeguard against arbitrary arrest is reasonable suspicion that would satisfy an objective observer that the person may have committed the offence (see A/HRC/22/44, para. 62).[2] The prohibition against arbitrary deprivation of liberty and the right to bring proceedings before a court in order to challenge the legality of the detention are non-derogable under treaty and customary international law, even during states of emergency.[3] Article 14 (2) of the Arab Charter on Human Rights also explicitly recognizes the non-derogable nature of this right.

31. The source further notes that, if it is the case that Mr. Al Nuaimi is held in relation to a counter-terrorism allegation — which has not been made clear to him — counter-terrorism laws must still comply with international standards. Laws regarding terrorism and associated offences, whether within the context of national or international acts, must be accessible, clearly defined, formulated with precision, and non-discriminatory and non-retroactive (see General Assembly resolution 63/185, para. 18, and E/CN.4/2006/98, para. 49). However, according to the source, no such charge has been made available to Mr. Al Nuaimi in any event.

32. In the light of the above, the source submits that the violations of Mr. Al Nuaimi's rights under fair trial norms are of such gravity as to give his deprivation of liberty an arbitrary character, falling under category III.

Response from the Government

33. On 25 January 2018, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, before 26 March 2018, detailed information about the current situation of Mr. Al Nuaimi and any comments on the source's allegations.

34. The Working Group regrets that it did not receive a response from the Government to that communication. Nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

[2] See also *Madani v. Algeria* (CCPR/C/89/D/1172/2003).

[3] See Human Rights Committee, general comment No. 29 on derogations from provisions of the Covenant during a state of emergency, para. 11.

Recent developments

35. According to the source, Mr. Al Nuaimi was released on 28 February 2018 after being held for eight months.

36. Furthermore, the prosecution is reportedly now building a new case against Mr. Al Nuaimi based on the additional intelligence provided by the United States after the two countries signed a counter-terrorism memorandum of understanding in July 2017.[4]

Discussion

37. Following Mr. Al Nuaimi's release on 28 February 2018, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this particular case, based on the circumstances, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

38. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

39. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments. Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[5] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[6]

Category I

40. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I, which concerns deprivation of liberty without invoking any legal basis.

41. According to the information provided by the source, which the Government chose not to contest, Mr. Al Nuaimi was arrested without the presentation of a warrant and he was not promptly informed of the reasons for his arrest or of any charges against him in violation of articles 3 and 9 of the Universal Declaration of Human Rights.[7] In addition, Mr. Al Nuaimi was not brought promptly before a judicial authority as stipulated in principle 11 of the Body of Principles.

42. The Working Group expresses its concern at the uncertainty of the charges that the Government has been trying to bring against Mr. Al Nuaimi. Even the prosecution appears to have been unable or unwilling to make a decision in this regard months after the start of Mr. Al Nuaimi's detention and court hearings.

43. If the Government has indeed been attempting to appeal Mr. Al Nuaimi's original acquittal in May 2016, as its latest official statement revealing his release in February 2018

[4] See the statement by the Qatari Government Communications Office. Available at: https://www.gco.gov.qa/en/2018/04/22/in-response-to-the-telegraph.

[5] See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

[6] See opinions No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

[7] See also article 14 (1) of the Arab Charter on Human Rights.

appears to indicate, the Working Group should conclude that Mr. Al Nuaimi's arrest and eight-month detention period violated article 9 of the Universal Declaration of Human Rights, along with article 276 of the Criminal Procedure Code and the principle of *ne bis in idem*.

44. The Working Group also notes with concern that Mr. Al Nuaimi was transferred from the headquarters of the State Security Forces to an unofficial detention facility in Doha. The Working Group has consistently considered that placing and detaining someone at a secret location is arbitrary per se, because no legal procedure has been followed, thereby lacking any legal basis for the deprivation of liberty.[8]

45. The Working Group further notes that the use of secret detention by the Government of Qatar deprived Mr. Al Nuaimi of his right to challenge the lawfulness of his detention before court in violation of principle 32 of the Body of Principles. The Working Group wishes to reiterate that habeas corpus is a human right that can be inferred from articles 8, 9 and 10 of the Universal Declaration of Human Rights (see A/HRC/19/57, para. 59).

46. The Working Group therefore concludes that Mr. Al Nuaimi's arrest and detention lack a legal basis and are thus arbitrary, falling under category I.

Category III

47. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Mr. Al Nuaimi were of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III.

48. The Working Group finds that the circumstances of this case are puzzling and further observations are required. The general and underlining context of the case is the fight against terrorism, with the information provided by the source about Mr. Al Nuaimi being listed consecutively by the United States and the Security Council as a "financer and facilitator of terrorism". However, the resumption of a criminal case against him in Qatar only occurred after a certain period of time. This raises serious concern about the ultimate motive of the case, especially when well-known global practices after 11 September 2001, such as secret detention in the context of countering terrorism, are involved. The source provides some elements towards such a motive, with the references to Mr. Al Nuaimi's human rights advocacy and the indirect and/or implicit political dimensions. This is further troubling to the Working Group, although the information is not sufficiently detailed for any conclusive observations in that regard.

49. Furthermore, the international context of the case is also of interest and one cannot help but notice the references to other States whether within the region or beyond. While a concerted effort among States is essential, each State must ensure respect for the fairness of the proceedings that the individual is subjected to. As the Working Group and numerous other relevant human rights mechanisms have consistently stated, respect for basic rights can only strengthen the fight against terrorism and help States succeed. Any blatant violation of basic rights, especially due process rights, would negatively affect the core mission of countering terrorism. It is particularly important that the intelligence and law enforcement agencies cooperate within the framework of the law, especially international human rights law, which protect individuals facing the justice system. Compliance with the rule of law will strengthen counter-terrorism and any disregard for such a rule only reduces the potential for success. All States involved are jointly responsible for compliance with the international norms.[9]

50. Concerning the violations of the right to a fair trial and due process suffered by Mr. Al Nuaimi in the present case, the Government of Qatar reportedly placed him in secret detention, as he was detained at an unknown location in Doha. In 2010, the Working Group and several special procedure mandate holders completed a joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42). In the joint study, the experts reiterated that international law prohibits secret detention, which

[8] See opinions No. 14/2009; No. 12/2006; and No. 11/2018. See also A/HRC/13/42.

[9] In this regard, see A/HRC/10/3, paras. 37–38.

violates a number of human rights norms, including the right to a fair trial (paras. 27 and 282). The experts found that certain practices inherent in secret detention, such as the use of secrecy and insecurity caused by the denial of contact with the outside world, place detainees in a situation of heightened vulnerability to violations of the right to a fair trial, including forced confession of guilt, denial of the presumption of innocence, inability to challenge the lawfulness of the detention, denial of access to legal representation, as well as torture and ill-treatment.[10] Moreover, during its thirty-seventh session, the Human Rights Council adopted a resolution in which it stressed that no one should be held in secret detention and urged States to ensure that all persons held in detention under their authority were provided with access to the courts and to investigate all alleged cases of secret detention, including under the pretext of countering terrorism.[11]

51. In the present case, the use of secret detention by the Government of Qatar also deprived Mr. Al Nuaimi of his right to legal assistance during his detention, and it denied him the right to have adequate time and facilities for the preparation of his defence and to communicate freely with the counsel of his own choosing.[12] In doing so, the Government of Qatar violated articles 9 and 10 of the Universal Declaration of Human Rights, as well as principles 2 and 10 of the Body of Principles. The Government also placed Mr. Al Nuaimi beyond the protection of the law, in violation of his right to recognition as a person before the law under article 6 of the Universal Declaration of Human Rights.[13]

52. As noted above, Mr. Al Nuaimi has not been brought promptly before a judicial authority, and he was not allowed to challenge the lawfulness of his detention before a court. Such practice also has the danger of seriously undermining the exercise of the right to defence. The Working Group also reiterates its concern at legal provisions, such as article 18 of Law No. 3/2014 on Combating Terrorism, that negate the right to judicial supervision and review of detention even while countering terrorism (see A/HRC/10/21, para. 54 (e)).

53. The Working Group further notes that the Public Prosecutor prevented Mr. Al Nuaimi from attending his first court hearing on 23 October 2017, allegedly in order to delay the full hearings. Regardless of the Government's motive, Mr. Al Nuaimi's right to be tried in his presence was ignored. The judge's willingness to accede to the Government's repeated requests for postponement of the proceedings also prejudiced Mr. Al Nuaimi's right to be tried without undue delay and raises questions about the fairness of his trial.

54. In the light of the foregoing, the Working Group concludes that the violations of Mr. Al Nuaimi's fair trial rights are of such gravity as to render his deprivation of liberty arbitrary, falling within category III.

Disposition

55. Although Mr. Al Nuaimi has been released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Abdulrahman bin Omair Rashed al Jabr al Nuaimi, being in contravention of articles 3, 6, 8, 9, 10 and 11 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

56. The Working Group requests the Government of Qatar to take the steps necessary to remedy the situation of Mr. Al Nuaimi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

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[10] See also opinions No. 14/2009, para. 21, and No. 5/2001, para. 10 (iii), in which the Working Group found that secret detention was a violation per se of the right to a fair trial under category III.

[11] See resolution 37/3, paras. 6 and 8–9. See also A/HRC/13/42, para. 26.

[12] United Nations Basic Principles and Guidelines, principle 9 and guideline 8. See opinions No. 63/2017, No. 21/2017 and No. 48/2016.

[13] See also opinions No. 47/2017, para. 25; and No. 46/2017, para. 23.

57. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Al Nuaimi an enforceable right to compensation and other reparations, in accordance with international law.

58. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Al Nuaimi and to take appropriate measures against those responsible for the violation of his rights.

59. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights and its Optional Protocols.

Follow-up procedure

60. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Al Nuaimi;

(b) Whether an investigation has been conducted into the violation of Mr. Al Nuaimi's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Qatar with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

61. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

62. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

63. The Government should disseminate through all available means the present opinion among all stakeholders.

64. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[14]

[*Adopted on 24 April 2018*]

[14] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 30/2018 concerning Bahaa Adel Salman Mattar and Maher Atieh Othman Abu Shawareb (United Arab Emirates)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 18 January 2018 the Working Group transmitted to the Government of the United Arab Emirates a communication concerning Bahaa Adel Salman Mattar and Maher Atieh Othman Abu Shawareb. The Government replied to the communication on 19 March 2018. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Bahaa Adel Salman Mattar is a citizen of Jordan, born in 1981, working as an information technology professional and living in Abu Dhabi, United Arab Emirates.

5. Maher Atieh Othman Abu Shawareb is also a citizen of Jordan, born in 1981, working as an information technology professional and living in Abu Dhabi, United Arab Emirates. Reportedly, Mr. Mattar and Mr. Abu Shawareb are colleagues.

6. According to the information provided by the source, Mr. Mattar was arrested on 14 October 2015 from his workplace at the offices of Al Rowad IT Solutions. Mr. Abu Shawareb was arrested on 30 October 2015 at his home. They were both deprived of their liberty without any arrest warrant and without being informed of the reasons for their detention. Both arrests were conducted by armed members of the State security forces, wearing civilian clothing and masks. The officers also searched their houses and seized documents and electronic devices, without a judicial order. After the arrests, both individuals were transferred to an unknown location where they were detained secretly for three months, allegedly in a situation of enforced disappearance.

7. The source submits that during their secret detention, they were interrogated under both physical and psychological torture. Mr. Mattar was reportedly stripped of his clothes and beaten all over his body, forced into stress positions for hours and threatened with harm to his family, whose fate was unknown to him. As for Mr. Abu Shawareb, the source claims that he was beaten to the point of unconsciousness, threatened with rape and prevented from taking his medication (he was taking medication for depression and following eye surgery). As a result of the severe injuries sustained under torture, Mr. Abu Shawareb had to be repeatedly transferred to the hospital for urgent care, and he underwent three operations.

8. Mr. Mattar and Mr. Abu Shawareb were reportedly coerced to sign confessions while being blindfolded. Both were allegedly told that they would be released only after signing the paper handed to them.

9. In February 2016, more than three months after their arrest, both men were reportedly transferred to Al Wathba prison in Abu Dhabi. For the first time, they were allowed to call their families and inform them of their whereabouts. On that occasion, they reported the acts of torture they had been subjected to at the hands of the State security forces and reported that they had been denied access to a lawyer. They also reported that they had not been brought before a judicial authority since their arrest.

10. The source also reports that the detainees' families were subjected to acts of intimidation and harassment in retaliation for their repeated attempts to obtain information about the fate and whereabouts of their relatives. After Mr. Abu Shawareb was detained, his brother approached the Criminal Investigative Directorate and local courts to request information on his fate and whereabouts, to no avail. As a consequence, he was arrested by the State security forces, interrogated for several hours, threatened and forced to sign a statement he was not allowed to read. Subsequently, Mr. Abu Shawareb's family left the United Arab Emirates out of fear. In November 2015, the authorities banned Mr. Mattar's family from the country, giving them short notice to leave the territory. In September 2016, after Mr. Mattar's uncle visited the detainee, he was threatened and ordered never to go back.

11. According to the source, in mid-May 2017, more than a year and a half after their arrest, the two men were brought before the public prosecutor for the first time, and charged. Their joint trial began shortly afterwards, before the Federal Court of Appeal. During the hearings, the victims repudiated the confessions they had made under torture. However, as State security officers were present and out of fear of reprisals, they could not speak freely about the acts of torture they had been subjected to. Despite their claims, their coerced self-incriminating statements were admitted as evidence and no investigation was ordered into their allegations.

12. Allegedly, both defendants were only allowed to appoint a lawyer in July 2017, once the trial had already begun. The trial hearings were held in camera. The defendants and their lawyers were reportedly not allowed to challenge the incriminating evidence nor to present any exculpatory evidence.

13. The source reports that, on 26 December 2017, Mr. Mattar and Mr. Abu Shawareb were convicted by the Federal Court of Appeal on terrorism-related charges and sentenced to 10 years' imprisonment and a fine of 1 million dirhams. The family was not informed of the precise charges under which they were sentenced. However, according to the source, media outlets indicated that they were convicted of "setting up pages on social media to promote the ideology of terrorist organisations by publishing articles, information, photos, videos and electronic documents, which jeopardise the interests" of the United Arab Emirates.[1] Those charges are reportedly criminalized under both article 34 of the anti-terrorism law and article 26 of the cybercrime law.

14. Reports from the source indicate that the authorities have failed to inform the respective families of the exact nature of the criminal charges or of the legal proceedings, despite repeated requests made on their behalf by the Jordanian Embassy in the United Arab Emirates.

15. The source submits that the deprivation of liberty of both individuals is arbitrary, falling under categories I and III of the categories applicable to cases submitted to the Working Group.

Category I

16. With regard to category I, the source claims that Mr. Mattar and Mr. Abu Shawareb were arrested without any warrant, nor were they given any reasons for their arrest; they were subsequently held in secret detention for more than three months, thus placing them outside the protection of the law. It is also submitted that the security forces which carried out the arrest act with absolute freedom, as they are under the direct control and orders of the Ministry of the Interior and are not subject to any judicial oversight. Moreover, the two individuals were presented to the public prosecutor and informed of the charges against them only in mid-May 2017, more than a year and a half after their arrest. Their detention from the onset of their arrest to May 2017 was allegedly without any legal basis, and the source argues that it constitutes a violation of article 9 of the Universal Declaration of Human Rights.

Category III

17. With regard to category III, the source states that Mr. Mattar and Mr. Abu Shawareb were brought before a judicial authority, i.e. the public prosecutor, a year and a half after their arrest. They were not allowed to exercise the right to challenge the lawfulness of their detention. In addition, from the onset of their detention and until an advanced stage of the trial, Mr. Mattar and Mr. Abu Shawareb were denied access to legal counsel. They were interrogated without the presence of a lawyer and they were unable to adequately prepare their defence. Moreover, the defendants' lawyer was not allowed to examine the evidence used to incriminate them or present any exculpatory evidence.

18. Furthermore, the source argues that by denying the detainees any contact with the outside world and by refusing to divulge the whereabouts and the conditions of the detainees to their relatives, the authorities inflicted severe suffering on the victims and their families amounting to a violation of the absolute prohibition of cruel, inhuman or degrading treatment. Also, while held in secret detention, Mr. Mattar and Mr. Abu Shawareb were subjected to severe acts of torture in order to extract self-incriminating statements. Both defendants were forced to sign statements without being allowed to read them beforehand. Mr. Mattar and Mr. Abu Shawareb informed the judge that they had been forced to sign the confessions extracted under duress; the court nevertheless admitted the self-incriminating statements as evidence.

[1] Abdulla Rasheed, "Emirati gets 15-year jail term for spying for Iran", Gulf News, 26 December 2017.

19. Finally, the source claims that the Federal Court of Appeal, which has been assigned primary jurisdiction to try cases of national security under Federal Law No. 11/2016, is composed of judges directly appointed by the Ministry of the Interior. As such, it is under the control of the executive branch of the Government and cannot be considered as independent or impartial. The source therefore submits that the trial of Mr. Mattar and Mr. Abu Shawareb was characterized by grave violations of minimum due process and fair trial guarantees, in contravention of articles 10 and 11 of the Universal Declaration of Human Rights, giving their deprivation of liberty an arbitrary character under category III.

Response from the Government

20. On 18 January 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information before 19 March about the current situation of Mr. Mattar and Mr. Abu Shawareb and any comments which it might have on the source's allegations.

21. The Government submitted its response to the regular communication on 19 March 2018. According to the Government, Mr. Mattar and Mr. Abu Shawareb were arrested on 14 October 2015 and 30 September 2015 respectively, in accordance with the laws of the United Arab Emirates, after being informed by officials of the reason for their arrest and the presentation of arrest and search warrants, which they were able to read in detail and understand. Their families were informed of the location that they were taken to in Abu Dhabi and each knew that, to safeguard his rights, he could contact his family during his detention in the State Central Private Prison.

22. In the Government's view, the source's claims are not backed by the evidence but are based solely on hearsay. The laws of the United Arab Emirates guarantee the rights of detainees without discrimination and proscribe assaults and abuses on their physical integrity.

23. The Government further maintains that Mr. Mattar and Mr. Abu Shawareb were not held in secret detention, as evidenced by the fact that they were presented to the court. Neither filed any complaint with the public prosecutor, the court or their lawyer, Mohammed Al-Breiki, about allegations of torture, ill-treatment or arbitrary detention.

24. Mr. Mattar and Mr. Abu Shawareb were referred to the public prosecutor on 28 December 2015, and the public prosecutor in turn referred their case to the competent court on 24 May 2017. On the same day, Mr. Mattar was charged with being a member of the Islamic State in Iraq and the Levant (ISIS), creating social media accounts favourable to ISIS aimed at spreading the ISIS ideology and spreading favourable information that promoted the ISIS ideology; Mr. Abu Shawareb was charged with attempting to join ISIS, creating social media accounts to spread and promote the ISIS ideology and planning a terrorist attack.

25. The Government claimed that Mr. Mattar and Mr. Abu Shawareb were able to appoint a lawyer, Mohammed Al-Breiki, and meet with him for the purpose of preparing their defence. They were informed of the charges against them, as the charges were publicly pronounced in court. The judge also gave them permission to comment on the charges against them during the hearing, as evidenced by the fact that they had access to the case file. All the guarantees of defence before a court were observed in arrangement with their lawyer, Mohammed Al-Breiki.

26. On 26 December 2017, the Abu Dhabi Federal Court of Appeal delivered its judgment in a public hearing that was attended by Mr. Mattar and Mr. Abu Shawareb, their lawyer and relatives and Jordanian diplomats. They were each given a 10-year prison term with expulsion from the United Arab Emirates after serving their sentence. The Court also ordered the seizure of the devices used to commit their crimes.

27. According to the Government, the source's submissions are without merit and lack genuine evidence. Mr. Mattar and Mr. Abu Shawareb were not detained arbitrarily, held in solitary confinement, tortured or threatened with life imprisonment. This is evidenced by

the fact that they were presented to the court that determines the appropriate punishment for the crimes committed.

28. The Government states that Mr. Mattar and Mr. Abu Shawareb were tried before a competent, independent and impartial tribunal on two instances. The law guarantees their right to appeal their sentences before the Supreme Federal Court. Mr. Abu Shawareb appealed his sentence to the Supreme Federal Court and a hearing scheduled for 12 March 2018.

29. The Government also adds that Mr. Mattar and Mr. Abu Shawareb have been in continuous contact with their relatives. Mr. Mattar has been visited by his uncle, Iyad Salman Selim Mattar, while Mr. Abu Shawareb has been visited by his mother, Maryam Khalil Mohammed Abu Shawareb, his two sisters, Nisreen and Sohair Attieh Abu Shawareb, and his brother, Hani Atteih Abu Shawareb, in accordance with the procedures of penal facilities.

30. According to the Government, Mr. Mattar and Mr. Abu Shawareb have received the necessary medical care, their health being monitored at one of the State hospitals, and are subject to periodic medical check-ups. Mr. Mattar has been taken to a dermatologist for the necessary check-ups and administration of medications while Mr. Abu Shawareb has been sent to the eye clinic in Mafraq Hospital for the necessary check-ups and X-ray tests and to specialized clinics for scheduled appointments. Both have the right to be presented before a doctor when medical intervention is required.

31. The Government claims that Mr. Mattar and Mr. Abu Shawareb have been imprisoned on the basis of a court order. The penal facility where they will serve their 10-year sentences meets all the standards required to ensure the physical integrity of prisoners in terms of the environment, ventilation and air conditioning.

32. The crimes committed by Mr. Mattar and Mr. Abu Shawareb pose a danger to State security, are of a terrorist nature and disrupt public order. The Government has the power to preserve its security and stability and the safety and security of all those within its territory.

33. On 26 March 2018, the Government submitted additional information concerning Mr. Abu Shawareb. According to the Government, Mr. Abu Shawareb acquired ammunition for firearms without permission from the competent authorities and acquired digital photographs, video clips and documents that promoted and endorsed ISIS and could be shown to others.

Discussion

34. The Working Group thanks the source and the Government for their extensive engagement and for their submissions in relation to Mr. Mattar's and Mr. Abu Shawareb's detention.

35. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

36. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.[2] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international

[2] See also General Assembly resolution 72/180, fifth preambular paragraph; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; and Human Rights Council resolutions 6/4, para. 1 (a), and 10/9.

human rights law.[3] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[4]

Category I

37. The Working Group will consider whether there have been violations under category I, which concerns deprivation of liberty without invoking any legal basis.

38. According to the information provided by the source, Mr. Mattar and Mr. Abu Shawareb were arrested without a warrant and were not promptly informed of either the reasons for their arrest or of the charges against them. While the Government states that Mr. Mattar and Mr. Abu Shawareb were arrested in accordance with the law and due process and that their families were informed of their place of detention and were able to visit and communicate with them, it failed to substantiate its claims in order to refute the prima facie allegations put forward by the source. The Government has offered no documentary evidence, such as a copy of the arrest warrant, visitation logs or telephone records.

39. The Working Group notes that any deprivation of liberty without an arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks any legal basis, in violation of articles 3 and 9 of the Universal Declaration of Human Rights[5] as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[6]

40. The Working Group underlines that the right to liberty and security of the person, enshrined in article 3 of the Universal Declaration of Human Rights, applies to everyone and is further guaranteed through article 9, which prohibits arbitrary arrest and detention. Both provisions are deeply entrenched human rights norms, reflected in both State practice and the jurisprudence of international judicial bodies and the Working Group.[7] Prohibition of arbitrary detention is part and parcel of customary law, which bears an absolute character in international law and is therefore binding upon all States, irrespective of their treaty obligations. Arbitrary detention is also in contravention of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex).[8] The Working Group notes the statement made by the International Court of Justice that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".[9]

41. In addition, for the purposes of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring

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[3] See opinions No. 1/1998, para. 13; No. 5/1999, para. 15; No. 1/2003, para. 17; No. 76/2017, para. 49; and No. 94/2017, para. 47.

[4] See opinions No. 33/2015, para. 80; No. 76/2017, para. 50; No. 83/2017, para. 60; No. 88/2017, para. 24; and No. 94/2017, para. 48.

[5] See also article 14 (1) of the Arab Charter on Human Rights.

[6] See opinions No. 48/2016, para. 48; No. 21/2017, para. 46; 63/2017, para. 66; and No. 76/2017, para. 55.

[7] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, para. 65; and ibid., Separate Opinion of Judge Cançado Trindade, paras. 107–142. See also opinions No. 30/2011, para. 18; No. 31/2011, para. 16; No. 33/2011, para. 16; No. 41/2011, para. 15; No. 42/2011, para. 21; No. 43/2011, para. 16; No. 44/2011, para. 18; No. 45/2011, para. 21; No. 22/2012, para. 44; No. 53/2012, para. 20; No. 14/2014, para. 18; and No. 76/2017, para. 56.

[8] See deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44, sect. III), paras. 42–51. See also A/HRC/30/37, para. 11, as well as opinions No. 15/2011, para. 20; No. 16/2011, para. 12; No. 63/2017, para. 51; and No. 76/2017, para. 56.

[9] See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, para. 91.

Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.[10] In order to ascertain such legal basis, the authorities must present the charges when a person is arrested and detained, which did not happen in the present case. In the absence of an arrest warrant and information about the charges, it would be difficult to challenge the lawfulness of detention.

42. The source has also alleged, and the Government has failed to refute with documentary proof, that Mr. Mattar and Mr. Abu Shawareb were held incommunicado in a secret location by the State Security Department for three months, which placed them outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.[11] The Working Group also refers to the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42).

43. Incommunicado detention in a secret location also prevented Mr. Mattar and Mr. Abu Shawareb from being brought promptly before a judge or other officer authorized by law to exercise judicial power and from taking proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention.[12]

44. The Working Group therefore considers that the arrest and prolonged incommunicado detention of Mr. Mattar and Mr. Abu Shawareb by the State Security Department lack any legal basis and may amount to torture, in violation of articles 3, 6 and 9 of the Universal Declaration of Human Rights and principle 2 of the Body of Principles. The Working Group thus concludes that their detention is arbitrary, falling within category I.[13]

Category III

45. The Working Group will now consider whether the alleged violations of the right to a fair trial and due process suffered by Mr. Mattar and Mr. Abu Shawareb were of such gravity as to give their deprivation of liberty an arbitrary character, thus falling within category III.

46. As noted above, Mr. Mattar and Mr. Abu Shawareb were arrested without a warrant and were not promptly informed of either the reasons for their arrest or of any charges against them. They were also held incommunicado in a secret location for a period of three months.

47. The Working Group is concerned that the incommunicado detention of Mr. Mattar and Mr. Abu Shawareb also entailed the denial of their right to notify and communicate with their families and lawyer, in accordance with principles 15–19 of the Body of Principles, and their right to be brought promptly before a judge and to be tried within a reasonable time, as stipulated in principles 37 and 38 of the Body of Principles.

48. The Working Group is also of the view that prolonged solitary confinement is prejudicial to the right to a fair trial and is in violation of articles 10 and 11 of the Universal Declaration of Human Rights.

49. The Working Group also notes with grave concern that Mr. Mattar and Mr. Abu Shawareb have been subjected to a continued practice of torture; that they were coerced to sign confessions while being blindfolded; and that their self-incriminating statements were admitted as evidence and no investigation was ordered into their allegations. Such practices constitute violations of articles 5, 6 and 9 of the Universal Declaration of Human Rights.[14] In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

[10] See A/HRC/30/37, para. 12.

[11] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 22.

[12] See, for example, opinions No. 53/2016 and No. 56/2016.

[13] See opinions No. 39/2016, para. 45; No. 17/2017, para. 37; No. 21/2017, para. 37; No. 63/2017, para. 53; and No. 76/2017, para. 61.

[14] See also articles 8, 22, 13 and 14 of the Arab Charter on Human Rights.

50. Furthermore, the Working Group finds that the denial of adequate time and facilities to Mr. Mattar and Mr. Abu Shawareb for the preparation of their defence and communication with their legal counsel and the denial of a chance to challenge the incriminating evidence and to present any exculpatory evidence constitute a violation of principles 17 (1) and 18 (1), (2) and (3) of the Body of Principles and of principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

Right to consular assistance

51. The Working Group notes that the Government appears not to have fully implemented the formal procedures necessary to establish the legal basis for the arrest and detention of a foreign national under the provisions of article 36 of the 1963 Vienna Convention on Consular Relations, to which the United Arab Emirates is a party.

52. Article 36 (1) (b) of the Convention provides that a foreign national arrested or committed to prison or to custody pending trial or is detained in any other manner should be informed without delay of his or her rights to inform consular officers about his or her detention and to have any communication addressed to them forwarded without delay. This is in addition to the right of consular officers to be informed of the detention and to maintain communication (art. 36 (1) (b)) and their right to arrange for legal representation and to visit in person (art. 36 (1) (c)).

53. The Working Group notes that the General Assembly has emphatically reaffirmed the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention.[15]

54. Furthermore, the Body of Principles recognizes in principle 16 (2) the importance of consular assistance for a detained or imprisoned foreign national by specifically mentioning his or her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national.

55. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provide, in rule 62, paragraph 1, that prisoners who are foreign nationals are to be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.

56. Given the limited availability of remedies for individuals in the international sphere, consular protection is invaluable for foreign nationals who are disadvantaged by the lack of familiarity with the local law, customs and even language. Furthermore, it should be noted that the institution of consular protection not only serves the interests of the detained foreign individual and of the State that espouses such interests, but also furthers the interests of the international community as a whole by facilitating international exchange and reducing the potential for friction between States over the treatment of their nationals.[16]

57. In the light of the factual and legal considerations noted above, the Working Group considers that the Government's failure to respect Mr. Mattar's and Mr. Abu Shawareb's right to consular protection under customary international law, as codified in article 36 of the Vienna Convention on Consular Relations, during their initial arrest and detention, is in violation of article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights and principle 16 (2) of the Body of Principles.

[15] See General Assembly resolution 72/179, para. 32. See also General Assembly resolutions 72/149, para. 4 (k) and 72/188, para. 15 (g); and Human Rights Council resolution 37/28, para. 2 (j).

[16] See opinion No. 58/2017, para. 64.

58. In the light of the foregoing, the Working Group concludes that the non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character, falling under category III.

59. The Working Group notes that the present opinion is only one of several opinions in which the Working Group has found the Government of the United Arab Emirates in violation of its international human rights obligations.[17] The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.[18]

Disposition

60. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Bahaa Adel Salman Mattar and Maher Atieh Othman Abu Shawareb, being in contravention of articles 3, 5, 6, 9, 10 and 11 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

61. Consequent upon the opinion rendered, the Working Group requests the Government of the United Arab Emirates to take the steps necessary to remedy the situation of Mr. Mattar and Mr. Abu Shawareb without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights.

62. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Mattar and Mr. Abu Shawareb immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

63. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Mattar and Mr. Abu Shawareb and to take appropriate measures against those responsible for the violation of their rights.

64. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights and the Optional Protocols thereto.

65. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Follow-up procedure

66. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Mattar and Mr. Abu Shawareb have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Mattar and Mr. Abu Shawareb;

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[17] See opinions No. 2/1998; No. 17/1998; No. 16/2002; No. 7/2004; No. 22/2004; No. 3/2008; No. 8/2009; No. 14/2010; No. 34/2011; No. 64/2011; No. 61/2012; No. 27/2013; No. 42/2013; No. 60/2013; No. 12/2014; No. 56/2014; No. 51/2015; No. 21/2017; No. 47/2017; No. 58/2017; and No. 76/2017. The Working Group expresses its particular concern at the spate of grave human rights violations, including arbitrary detention, following the 2011 Arab Spring.

[18] See article 7 (1) (e) of the Rome Statute of the International Criminal Court. The Working Group specifically alluded to this possibility vis-à-vis the United Arab Emirates in opinion No. 47/2017, para. 36.

(c) Whether an investigation has been conducted into the violation of Mr. Mattar's and Mr. Abu Shawareb's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United Arab Emirates with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

67. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

68. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

69. The Government should disseminate through all available means the present opinion among all stakeholders.

70. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[19]

[*Adopted on 25 April 2018*]

[19] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, (17 to 26 April 2018)

Opinion No. 31/2018 concerning Mohamed Al-Bambary (Morocco)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. On 5 September 2017, in accordance with its methods of work (A/HRC/36/38), the Working Group transmitted to the Government of Morocco a communication concerning Mohamed Al-Bambary. The Government replied to the communication on 13 November 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Al-Bambary is a Saharawi media activist and human rights defender.

5. According to the source, in 2011, Mr. Al-Bambary began working as a correspondent for Équipe Média, a group of media activists who document and disseminate information on abuses occurring in Western Sahara. The source maintains that Équipe Média is the principal independent press organization in Western Sahara and has been subjected to serious harassment by the Moroccan authorities. As part of his work for Équipe Média, Mr. Al-Bambary documented violence used by the Moroccan security forces and by Moroccan settlers against the indigenous population of Western Sahara. As a result of his work, Mr. Al-Bambary was first subjected to harassment by the Moroccan authorities, including through attempted police arrest, in August 2011.

6. The source reports that between 25 and 27 September 2011, seven persons were killed in a riot following a football match at Dakhla. Mr. Al-Bambary covered those events and succeeded in documenting a number of acts of violence committed during the riot. The source states the Mr. Al-Bambary in no way participated in the violence himself. Eventually, five men were declared guilty and sentenced to three years in prison for their part in the riots.

Background

7. The source explains that the United Nations Organization considers Western Sahara to be a "Non-Self-Governing Territory". It points out that Morocco continues to administer Moroccan law throughout the province and to suppress the independence movement. The Saharawi, especially those who support independence, face serious discrimination in respect of education, employment, access to social services and treatment by the justice system. Morocco places considerable restrictions on freedom of expression and of association in Western Sahara, particularly in matters relating to its independence. Numerous journalists have been prosecuted under laws criminalizing criticism of Moroccan claims on Western Sahara, resulting in self-censorship by the Saharawi media. Morocco also restricts independence organizations' freedom of association.

8. The source stresses that in this repressive climate the arbitrary detention of journalists and militants has become generalized. Problems common to arbitrary detention include arrest without warrant, detention beyond the legal limit for filing charges and prolongation of pretrial detention. Those who are imprisoned for their political activities are in general held under fabricated charges. Although the Constitution of Morocco guarantees the independence of the judiciary, outside influences considerably weaken the independence of judges. Indeed, the political situation has eroded respect for safeguards guaranteed by Moroccan law, such as access to a lawyer or the presumption of innocence. According to the source, recourse to the use of torture to extract confessions is frequent in cases against the Saharawi or against persons accused of terrorism. Finally, conditions of detention in Western Sahara are particularly poor due to prison overcrowding, insalubrious and poorly ventilated cells, physical violence, insufficient food and lack of health care.

Arrest and detention

9 The source states that Mr. Al-Bambary was arrested on 26 August 2015 at the Dakhla police station, where he had gone to have his identity papers renewed. At the time of his arrest, the police accused Mr. Al-Bambary of having taken part in pro-independence demonstrations that had occurred in 2015. No arrest warrant was issued, however, and Mr. Al-Bambary was not informed of the precise charges levelled against him. The source notes that Mr. Al-Bambary was detained incommunicado and was not allowed to speak to a lawyer before his appeal hearing in January 2016. During his detention, he was beaten to obtain a confession. His interrogators demanded information on the Dakhla demonstrations in 2011 and 2015, on who financed his work, as well as on the "foreign entities" that published his work. He was not permitted to read or examine the documents he was forced to sign.

10. On 31 August 2015, Mr. Al-Bambary was summoned before a judge to be charged. The judge refused to grant him bail, without justifying the reason. Towards 20 October 2015, the El-Aaiun appeal court, acting as the court of first instance, examined Mr. Al-Bambary's case. While he had previously understood his arrest to be connected to his alleged participation in the 2015 demonstrations, during the trial he found out that the charges were in fact related to the 2011 riots. More precisely, he was accused of having assembled a criminal gang, participated in a murder, obstructed the public way, taken part in a deadly fight, committed violent acts against public servants, and of having sabotaged public property, in contravention of articles 293, 294, 392, 267, 129, 591, 271 and 595 of the Penal Code of Morocco.

11. According to the source, those hearings were held in closed session. Mr. Al-Bambary was not assisted by a defence counsel. Moreover, he was not allowed to present his case and the court based its conviction entirely on a police report. According to the source, the judge treated Mr. Al-Bambary with open contempt. He refused to allow him to speak and when he did try, ordered the police to remove him from the court. On 4 November 2015 the court of first instance convicted Mr. Al-Bambary on all charges and sentenced him to 12 years' imprisonment.

12. According to the source, Mr. Al-Bambary began a hunger strike on 5 November 2015. He called it off on 13 January 2016, immediately following his conviction on appeal.

13. On 12 January 2016, Mr. Al-Bambary appeared before the El-Aaiun appeal court of second instance. That time the trial was public and many people who sympathized with Mr. Al-Bambary attended the hearing. He was not permitted to meet with his lawyer before the hearing to prepare his defence.

14. The prosecutor accused Mr. Al-Bambary of having taken part in the 2011 riots, asserting that the men convicted in the previous case had confessed that he was implicated in a homicide. Mr. Al-Bambary categorically denied any participation whatever in violent acts. The source states that Mr. Al-Bambary's lawyers, suspecting that the so-called confessions of the prisoners in the previous case had been extracted under torture, recalled the political motives behind the case. The judge rejected two defence motions: firstly, for an adjournment, to allow the lawyers to prepare a proper defence and, secondly, a request to hear the testimony of the individuals whose incriminatory statements were being put forward by the prosecutor as evidence against Mr. Al-Bambary.

15. According to the source, defence counsel had presented evidence showing that Mr. Al-Bambary was a human rights militant and a journalist for Équipe Média. The only witness who testified during the trial was an eminent human rights defender, who rejected any sort of involvement by Mr. Al-Bambary in the crimes of which he was accused. His legal counsel's defence included the argument that the Government had violated article 22 of the Moroccan Constitution on the prohibition of torture.

16. According to the source, the prosecution's sole item of evidence was the supposed confessions of the previously convicted men that Mr. Al-Bambary had been involved; those persons were not called to testify before the court. The court of second instance upheld Mr. Al-Bambary's conviction, but reduced his sentence to six years' imprisonment, a sentence three years longer than all other convictions for participation in the riots. In December 2016, the court of cassation rejected Mr. Al-Bambary's final appeal.

17. Mr. Al-Bambary is currently being held in the Ait Melloul prison. His health has deteriorated in jail and on 28 December 2015 he was hospitalized for complications related to his hunger strike. He continues to suffer from asthma and a stomach ulcer.

18. The source considers that Mr. Al-Bambary's detention constitutes arbitrary deprivation of liberty falling within category II, category III and category V as defined by the methods of work applicable to the examination of cases submitted to the Working Group on Arbitrary Detention.

Category II

19. The source argues that Mr. Al-Bambary's detention is arbitrary under category II, because he was arrested, detained and convicted for having exercised his freedom of

expression and freedom of association. These freedoms are protected under article 19 (2) and 22 (1) of the International Covenant on Civil and Political Rights and by articles 19 and 20 (1) of the Universal Declaration of Human Rights.

20. According to the source, given the history of the Government's attempts to intimidate the Équipe Média journalists into silence by harassment and arbitrary arrest, it is clear that the Government of Morocco targeted Mr. Al-Bambary and imprisoned him to prevent him from continuing his work as a journalist documenting Moroccan abuse against Western Saharan citizens. The fact that Mr. Al-Bambary was arrested close to four years after his alleged crime (while no effort had been made to apprehend him when the riots had occurred following a football match in 2011), that no warrant was served and that Mr. Al-Bambary was not informed of the charges against him at the time of his arrest, reveal the tenuous link between his arrest and his alleged offence. Moreover, during his interrogation, when torture was employed, the nature of the questions put to Mr. Al-Bambary regarding the identity of the persons who financed and published his work show that the Moroccan Government's interest in Mr. Al-Bambary was in reality connected to his freedom of expression and of association as an Équipe Média journalist.

Category III

21. The source maintains that Mr. Al-Bambary's detention is arbitrary under category III, on the grounds that the Government denied him the right to a fair trial as required by international standards.

22. The source notes that, in accordance with article 9 (1) of the Covenant, with article 9 of the Universal Declaration of Human Rights and with principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, an individual has the right not to be subject to arbitrary arrest. This right requires that the arrest must be carried out in accordance with the provisions of the national law relating to deprivation of liberty. In Mr. Al-Bambary's case, this right was violated, because the police breached Moroccan law by failing, when arresting him, to serve him with a warrant allowing him to contest his detention before a judge within 24 hours and to gain prompt access to a defence counsel.

23. The source also observes that, in accordance with article 9 (2) of the Covenant and principle 10 of the Body of Principles, a detainee has the right to be informed, at the time of arrest, of the reasons for his arrest and to be promptly informed of the charges held against him. The source notes that the authorities did not present Mr. Al-Bambary with a warrant for his arrest; nor did they explain precisely why he had been arrested. Instead of these formal safeguards, Mr. Al-Bambary was led to believe that he had been arrested in connection with the 2015 pro-independence demonstrations. He was in fact informed of all the charges against him only at the start of his trial, nearly two months later.

24. The source also states that, in accordance with articles 9 (3) and (4) of the Covenant and with principles 4, 11 (1), 32 and 37 of the Body of Principles, any person has the right to contest the lawfulness of his detention by being brought promptly before a judicial authority. Furthermore, incommunicado detention fundamentally violates article 9 (3) of the Covenant. Article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles guarantee that in the absence of a specific decision to the contrary, any person detained is entitled to be released pending trial. The source argues that Morocco violated Mr. Al-Bambary's rights by refusing to allow him to contest his detention until 31 August 2015, a delay that exceeds the requirement by which a detainee must be brought "promptly" (within 48 hours) before a judge. Moreover, at his arraignment on 31 August 2015, the judge refused Mr. Al-Bambary bail pending the trial, without giving any reason.

25. The source notes that articles 7 and 10 (1) of the Covenant, articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the Universal Declaration of Human Rights and principle 6 of the Body of Principles ensure that persons under detention are protected against torture and cruel, inhuman or degrading treatment or punishment. Article 14 (3) of the Covenant and principle 21 (2) of the Body of Principles expressly prohibit the use of torture to obtain a forced confession. The source maintains that Morocco violated this prohibition when Mr.

Al-Bambary was beaten under interrogation to make him confess and give information on the identity of the persons who financed and published his work.

26. The source holds that, by virtue of article 14 (1) of the Covenant and articles 7 and 10 of the Universal Declaration of Human Rights, all persons have equal rights before the courts and are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This safeguard requires that access to the hearing should not be limited to a restricted group of persons; that the judiciary should be free from influence by the executive; that the tribunal should appear impartial to an objective observer; and that both parties should enjoy the same procedural rights. The source notes that in the case of Mr. Al-Bambary, those rights were violated, as the trial in the court of first instance was held in closed session, while the appeal proceedings of 12 January 2016 were markedly partial towards the prosecution. During the first instance proceedings, Mr. Al-Bambary was never given a real opportunity to defend himself; he was denied access to a lawyer and convicted on the basis of a police report and a confession obtained under torture. At the appeal, the court of second instance refused two defence motions which would have allowed him to argue his case on an equal footing with the prosecution, as explained above.

27. The source observes that, contrary to article 14 (2) of the Covenant, article 11 (1) of the Universal Declaration of Human Rights and of principle 36 (1) of the Body of Principles, the court of first instance violated Mr. Al-Bambary's right to presumption of innocence by treating him as if his guilt was already established. Besides depriving Mr. Al-Bambary of a lawyer and the opportunity to present his case, the court of first instance did not base its conviction on evidence presented by the Office of the Public Prosecutor, but solely on a police report, which most probably contained a confession obtained through torture. Furthermore, the court of first instance did not take the time to deliberate, but convicted Mr. Al-Bambary immediately after reading out the list of charges against him.

28. The source also notes that, contrary to articles 14 (3) (b) and (d) of the Covenant and to principles 11 (1), 15, 17 (1) and 18 of the Body of Principles, the police held Mr. Al-Bambary incommunicado, without access to his lawyer until his appeal hearing, which meant that he was not represented during his interrogation, his arraignment or his trial before the court of first instance. He was also not permitted to meet with his lawyer in order to prepare his defence before his appeal. Nor was he able to prepare his defence himself prior to his initial trial, because he had not been informed of the charges against him and because the judge did not let him speak during the hearing.

29. The source maintains that, under article 14 (3) (e) of the Covenant, the accused has the right to examine all the prosecution witnesses. In this case however, Mr. Al-Bambary was not permitted to examine them during the trial of first instance, where the judge did not let him speak, nor during his appeal, where the judge expressly denied defence counsel's request to call the prosecution witnesses who had testified against Mr. Al-Bambary.

Category V

30. The source maintains that Mr. Al-Bambary's detention is arbitrary under category V, as the Government detained Mr. Al-Bambary partly as a result of its discriminatory attitude towards him as a Saharawi and a defender of Saharawi rights.

31. The source observes that, contrary to articles 2 (1) and 26 of the Covenant, articles 2 and 7 of the Universal Declaration of Human Rights, article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, and principle 5 (1) of the Body of Principles, the arrest, detention and treatment of Mr. Al-Bambary took place in a climate of generalized discrimination against the Saharawi people and against those who defend their rights. The fact that the interrogation concentrated on Saharawi demonstrations and on the identity of the persons financing Mr. Al-Bambary's pro-Saharawi statements proves that the authorities were focusing on his role as a defender of Saharawi rights. The general picture of the Government's harassment of the Saharawi and of the defenders of their rights, including previous acts of harassment against Mr. Al-Bambary, the illogical timing of his arrest, which occurred four years after his alleged crime, as well as the consequences of his conviction — namely that he was left unable to

continue his work documenting abuse of the Saharawi — clearly show that Mr. Al-Bambary's identity as a Saharawi and a defender of Saharawi rights was the real reason for his arrest, trial and conviction, in violation of his right to non-discrimination before the law.

Reply of the Government

32. The Government replied to the communication on 13 November 2017.

33. In its reply, the Government first contests the general affirmations of a political nature regarding Western Sahara, recalling that the region is a Moroccan province and that the political dispute falls exclusively under the responsibility of the Security Council, within a settlement framework in place since 2007.

34. The Government also recalls that freedom of association, freedom of opinion and freedom of expression in the western provinces of Morocco were clearly established in the 2011 Constitution and are respected. It points out that the local authorities in the town of Laayoune had registered 2,984 associations. In the town of Dakhla, 937 associations had been registered. Finally, it adds that many bodies, including foreign delegations, political party leaders, academics and the diplomatic missions of States and international organizations all enjoyed uninterrupted access to these provinces and could thus appreciate the reality of these freedoms.

35. The Government identifies the victim as being Mr. Mohamed Benbari bin Abdullah bin Khalil, a Moroccan citizen born in 1969 and residing at Dakhla. His schooling did not go beyond the fifth year of primary school and he is said to be not a journalist but a sea fisherman. The Government affirms that he never presented a press accreditation card and had never applied to be a member of the Moroccan National Press Union, besides the fact that there was not a single publication bearing his name. However, according to the Government, an arrest warrant had indeed been issued prior to his arrest on 27 August 2015. He was brought before the judge on 29 August 2015, then sentenced by decision of the court of first instance on 31 August 2015 for having assaulted a public officer in the course of his duty and destroyed public property to one month's imprisonment and a fine of 500 dirhams. The Laayoune court of appeal upheld this judgment on 25 August 2016.

36. According to the Government, on 16 November 2011, another arrest warrant had been issued on account of a riot in Dakhla that had resulted in several deaths following a football match. Because of this, on 1 September 2015, the Office of the Public Prosecutor ordered the referral of Mr. Benbari before the investigating judge and a ruling was handed down on 4 November 2015 by which Mr. Benbari was sentenced to 12 years' imprisonment for assault resulting in death. On 12 January 2016, the Laayoune court of appeal commuted the sentence to six years for affray resulting in death. Mr. Benbari's appeal of 16 November 2016 was dismissed by the court of cassation. The Government maintains that the entire procedure was public, that the accused enjoyed the assistance of several lawyers and that he had never reported any ill-treatment or requested a medical examination.

37. Lastly, the Government gave details of Mr. Benbari's detention conditions and management of his health issues, showing them to be optimal.

Reply of the source

38. The Government's reply was brought to the attention of the source on 13 November 2017 for any additional comment. The source replied on 20 November 2017, contesting the Government's reply on three points: the political issues surrounding Western Sahara; factual assertions unsupported by evidence; and the allegations that remained unanswered by Morocco.

Examination

39 The communication addressed to the Government on 5 September 2017 called for a reply by 6 November 2017 at the latest. On 3 November 2017, Morocco requested an extension to that time limit. The Working Group replied immediately, asking the Government to give reasons for the requested extension. However, as no reasons were forthcoming, the Working Group allowed an extension of no more than seven days to

enable the Government to submit its reply. On 13 November 2017, the permanent mission submitted the Government's reply to the Working Group under cover of a note verbale dated 11 November 2017. Since the reply was in Arabic, the Working Group had to delay consideration of the case in order to have the reply translated into one of the Group's working languages. The Working Group thanks the parties for their cooperation.

40. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof rests with the Government should it wish to refute the allegations (see A/HRC/19/57, para. 68).

41. As regards the general situation explained by the source, the Working Group recalls that it had examined the situation of Western Sahara in its mission report,[1] and had "received numerous complaints indicating a pattern of excessive use of force in repressing demonstrations and in arresting protestors or persons suspected of participating in demonstrations calling for self-determination of the Sahrawi population".[2] At the same time it found "that torture and ill-treatment were used to extract confessions and that protestors were subjected to excessive use of force by law enforcement officials".[3]

42. The Working Group recalls in this connection that confessions cannot be taken as evidence in a trial where they have been obtained through torture or ill-treatment. The Working Group further recalls that to consider that the "records established by the judicial police are prima facie evidence [...] is tantamount to reversing the burden of proof by requiring the accused to prove his innocence, which is contrary to the principle of the presumption of innocence, as stated in article 23 of the Constitution. It also creates conditions that encourage the torture and ill-treatment of suspects."[4] Moreover, in its report, the Working Group had been able to observe that "in the majority of cases, lawyers meet their clients only at the first hearing before the judge"[5] and that the police were reluctant to "to inform detainees of their right to have access to a lawyer in criminal cases".[6]

43. The source's allegations partly concur with the observations of the Working Group and highlight the situation of journalists and human rights defenders in Western Sahara. The Working Group also noted similar allegations in previous opinions.[7] The source indicates that this situation particularly affects Équipe Média journalists, several of whom have been subjected to pressure or arrested, among them Mr. Al-Bambary who, according to the source is an Équipe Média correspondent and a human rights defender in Western Sahara. The source states that the complainant had already been subjected to harassment.

44. In the course of his work, Mr. Al-Bambary reported on a pro-independence demonstration in 2015. On 26 August 2015, Mr. Al-Bambary was arrested without being served a warrant. He was clearly being held to account for having taken part in the 2015 demonstration. Five days after his arrest, without his lawyer being present, he was brought before a judge for his arraignment. The judge refused to grant him bail, without giving any reason.

45. Furthermore, according to the source, the nature of the questions asked to Mr. Al-Bambary during his interrogation, which focused primarily on the identity of the persons who financed and published his work, would suggest that what really interested the Moroccan Government was the media coverage of the events as well as Mr. Al-Bambary's work for Équipe Média. In that connection, the Working Group considers that Mr. Al-Bambary' activity had indeed been journalistic and that it is not necessary to possess a press accreditation card or to be a member of a professional association to exercise such an activity, contrary to the Government's arguments.

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[1] See A/HRC/27/48/Add.5, paras 62–71.
[2] Ibid, para. 64.
[3] Ibid, para. 63.
[4] Ibid, para. 33.
[5] Ibid, para. 45.
[6] Ibid.
[7] Opinions Nos. 11/2017 and 54/2013.

46. Being convinced that Mr. Al-Bambary was providing media coverage of the political demonstrations mentioned above, the Working Group considers that his arrest and detention are in violation of the protection afforded him under articles 19, 22 and 26 of the Covenant. It follows that Mr. Al-Bambary is arbitrarily detained under category II.

47. The source also alleges that during his detention Mr. Al-Bambary was subjected to ill-treatment, being forced to sign documents without knowing their content. The Government affirms that Mr. Al-Bambary had limited education, without explaining how he had been able to understand the confessions used for his conviction. There is therefore violation on two counts. Firstly, evidence obtained by imposing restraint on the accused is inadmissible in law. Secondly, it is an essential rule of criminal justice that no one should ever be coerced into testifying against him or herself.

48. Moreover, the source reports that the complainant met with his lawyer only at the time of his first hearing, which prevented him from preparing his defence. The same happened during his second trial. Furthermore, Mr. Al-Bambary was reportedly not given the opportunity to express himself during the first trial, which was held in closed session. The Government maintains that Mr. Al-Bambary definitely had a lawyer, but that he chose not to take up his right to be represented, without providing any proof of this assertion. The Working Group considers that the right to legal assistance and representation is essential, to the extent that should the State maintain that the accused renounced this right without evidence to support that assertion, then it would be detrimental to the rights of the accused to find in favour of the State on this question. The Working Group is therefore of the opinion that the source is correct on this point.

49. These situations constitute particularly serious violations of the right to a fair trial as established under article 14 of the Covenant. The Working Group concludes that, even if a trial should not take place as a result of the positive conclusion under category II, violation of the right to a fair trial makes the detention arbitrary under category III.

50. The allegation of restraint and ill-treatment during detention will be sent to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

51. Lastly, the Working Group notes the unceasing abuse of persons who, like Mr. Al-Bambary, work in the independent media in Western Sahara and who cover events related to Saharawi self-determination and to human rights violations.[8] The Government rejects this allegation without bringing forward any evidence in support of its position. The Working Group, however, is convinced in the light of the circumstances described in the file that Mr. Al-Bambary has been subjected to discrimination, in breach of international law and in particular of article 2 (1) of the Covenant. The Working Group therefore considers that Mr. Al-Bambary's detention is arbitrary under category V as well.

Disposition

52. In light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mohamed Al-Bambary, being in contravention of articles 2, 5, 7, 9, 10, 11 (1), 19 and 20 (1) of the Universal Declaration of Human Rights and of articles 2 (1), 9, 14, 19, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls under categories II, III and V.

53. The Working Group requests the Government of Morocco to take the necessary steps to remedy the situation of Mr. Al-Bambary without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

54. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Al-Bambary, to accord him an enforceable right to reparation, including compensation and a guarantee of non-recurrence,

[8] Opinion No. 11/2017.

in accordance with international law, and to provide them with the appropriate medical care required by his condition.

55. The Working Group urges the Government to conduct a full and independent investigation into the circumstances surrounding the arbitrary deprivation of liberty of Mr. Al-Bambary and to take appropriate measures against those responsible for the violation of his rights.

Follow-up procedure

56. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on all action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Al-Bambary has been released and, if so, on what date;

(b) Whether reparations, including compensation, have been made to Mr. Al-Bambary;

(c) Whether an investigation has been conducted into the violation of Mr. Al-Bambary's rights and, if so, the outcome of the investigation;

(d) Whether Morocco has modified its legislation or practice in order to bring them into line with its obligations under international law, as recommended in the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

57. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether any further technical assistance is required, for example on the occasion of a visit by the Working Group.

58. The Working Group requests the source and the Government to provide the requested information within six months of the date of transmission of the present opinion. Nevertheless, the Working Group reserves the right to take its own action in follow-up to the opinion should new concerns in relation to the case be brought to its attention. That would enable it to inform the Human Rights Council as to whether progress has been made in the implementation of its recommendations, or on the contrary whether no action whatsoever has been taken in that respect.

59. The Government should disseminate through all available means the present opinion among all stakeholders.

60. The Working Group recalls that the Human Rights Council has called on all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of all persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[9]

[*Adopted on 25 April 2018*]

[9] See Human Rights Council resolution 33/30, paras. 3 and 7.